STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2007
v	No. 264000 Lenawee Circuit Court
MIGUEL RODRIGUEZ, Defendant-Appellant.	LC No. 04-011179-FH

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

The jury convicted defendant of possession of methamphetamine, MCL 333.7403(2)(b)(i), and the trial judge sentenced defendant to probation for five years, with the first six months to be served in jail. We affirm.

I. Facts

The police observed defendant sitting in a van in front of the home of Audie Stokes, who had been arrested five days earlier for operating a methamphetamine laboratory inside the home. Police officers approached the van to investigate and asked defendant to step out of the vehicle. An officer testified that defendant appeared to toss something onto the ground as he got out of the van. The police later found a bag containing 2.25 grams of methamphetamine on the ground near the van. Defendant denied that he ever possessed the bag.

II. Voir Dire

Defendant argues that, when the trial judge refused to ask a prospective juror whether he believed that police officers had a better memory than an average citizen, the judge erroneously limited the scope of jury voir dire and prevented defendant from forming a factual basis for his exercise of peremptory challenges.

The scope of voir dire examination is entrusted to the discretion of the trial court and will not be set aside absent an abuse of discretion. *People v Daniels*, 192 Mich App 658, 666; 482 NW2d 176 (1992). Voir dire may not be restricted in manner that prevents the development of a factual basis for the exercise of peremptory challenges. *People v Tyburski*, 196 Mich App 576, 581; 494 NW2d 20 (1992).

Here, a juror disclosed that he was employed as a firefighter and, therefore, had several friends who were police officers. The trial court then asked the juror if there was "anything about any of those relationships that would make it difficult for you to be fair and impartial in this case" and the juror responded, "No, sir." The juror also stated that he could not think of any reason why he could not be fair and impartial.[1] Though the trial court did not ask the juror whether he believed that a police officer might have a better memory than an average citizen, as requested by defense counsel, the court specifically inquired into the juror's relationships with police officers and whether there was "anything" about "any" of those relationships that would make it difficult for the juror to be fair and impartial. We believe that the court's questioning was sufficient to provide an adequate factual basis for the exercise of peremptory challenges.

III. Suppression of Evidence

Defendant also contends that the trial court erred when it denied his motion to suppress the plastic bag and methamphetamine. Defendant says that the police officers illegally held him when they approached his van and asked him to step out and produce identification. According to defendant, the plastic bag and drugs were the product of this allegedly illegal seizure. We disagree.

As stated in *People v Dagwan*, 269 Mich App 338, 341-342; 711 NW2d 386 (2005):

> We review de novo the trial court's ultimate decision to suppress evidence on the basis of an alleged constitutional violation. But we review the trial court's findings of fact for clear error, deferring to the trial court's special opportunity to determine the credibility of witnesses appearing before it. We will only determine that a finding of fact is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. [Citations omitted.]

The United States and Michigan Constitutions guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, §11. But as our Supreme Court explained in *People v Jenkins*, 472 Mich 26, 32-33; 691 NW2d 759 (2005):

> Under certain circumstances, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest. A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior. Of course, not every encounter between a police officer and a citizen requires this level of

[1] Defense counsel later used his last peremptory challenge to excuse this juror.

> constitutional justification. A "seizure" within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized.
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> Asking such questions to elicit voluntary information from private citizens is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. As the United States Supreme Court has recognized, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." [Citations and internal quotations omitted.]

Here, there was no seizure when the police initially approached the van and asked for identification. Moreover, we disagree with defendant's argument that the police could not properly ask him to step out of the vehicle. By this time, the police had reasonable suspicion to make a valid investigatory stop. The van had pulled up in front of a home with a known methamphetamine lab. The van had parked on the wrong side of the road, the headlights were turned off, and the occupants simply sat in the vehicle. When the officers approached and asked for identification, neither Witte nor defendant could produce any. Under these circumstances, the police could briefly detain defendant to investigate the situation. Further, the police only discovered the bag of drugs on the ground, which established probable cause for defendant's arrest, because of defendant's own conduct when he flailed his arms as he stepped out of the van. Accordingly, the trial court did not err when it denied defendant's motion to suppress.

IV. Exclusion of Evidence

Further, defendant asserts that the trial court erred when it excluded evidence of a recorded telephone conversation between Stokes and Linda Niles. Defendant argues that this evidence was relevant to show that he was aware of the drug raid and cleanup operation at Stokes's residence, and to show that his purpose in going to Stokes's home was to relay a message from Stokes to Stokes's girlfriend.

The trial court erred to the extent that it excluded the evidence on hearsay grounds. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay evidence is generally inadmissible. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). However, evidence that demonstrates an individual's state of mind will not be precluded by the hearsay rule. As explained in *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995):

> Wherever an utterance is offered [into] evidence [for] the *state of mind* which ensued in *another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned. [Citation omitted.]

Here, the evidence was offered, not for its truth, but to explain why defendant went to Stokes's residence. Therefore, it was not hearsay.

We also agree that the evidence was relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence is generally admissible at trial. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Here, the evidence was relevant because it supported defendant's theory that he went to Stokes's house to deliver a message from Stokes.

However, evidentiary error requires reversal only if it involves a substantial right and, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Moorer*, 262 Mich App 64, 74; 683 NW2d 736 (2004). Here, defendant sought to introduce the evidence to explain why he was at Stokes's house and to show that he was aware that Stokes had been arrested for operating a methamphetamine laboratory in his home. However, at trial, Niles, Loretta Witte, and defendant all testified consistently with that evidence. Each of these witnesses also testified that they knew that Stokes was in jail for operating a methamphetamine lab out of his home and that a cleanup operation was taking place on the evening defendant was arrested. Accordingly, the excluded evidence was cumulative of other evidence. Ultimately, the jury was only required to determine whether defendant possessed the bag of drugs that was found near his van, regardless of defendant's reason for being at that location. And, though the jury repeatedly heard testimony about why defendant was at the house and that he knew about the cleanup, the jury concluded that defendant possessed the bag of drugs that was seized. Under the circumstances, the exclusion of the evidence did not affect the outcome of the trial.

V. Ineffective Assistance of Counsel

Defendant says that defense counsel was ineffective for not impeaching Officer Galbreath's trial testimony with his prior preliminary examination testimony in which he stated, when testifying about why he believed that defendant tossed something when he flailed his arms, that he "[j]ust saw something out of the corner of my eye." The record discloses that defense counsel used Officer Galbreath's prior testimony at a suppression hearing to attempt to impeach his trial testimony. Defendant has not overcome the presumption that defense counsel's manner of cross-examination was a matter of sound trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Furthermore, in light of counsel's use of equivocal suppression hearing testimony, there is no reasonable probability that further use of the preliminary examination testimony would have changed the result. Thus, defendant has not shown the requisite prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

VI. Sufficiency of Evidence

Finally, the prosecution presented sufficient evidence to enable the jury to find, beyond a reasonable doubt, that defendant possessed the methamphetamine. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Again, the record shows that defendant made a flailing motion with his arms and appeared to toss an object as he exited his vehicle in response to a police officer's request, and that the police subsequently found a baggie that contained 2.25 grams of methamphetamine a

few feet from defendant's vehicle. This evidence was sufficient to support defendant's conviction.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette